

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION**

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IN THE MATTER OF ) CC DOCKET NO. 92-77  
)  
BILLED PARTY PREFERENCE ) FURTHER NOTICE OF PROPOSED  
FOR 0+ INTERLATA CALLS ) RULEMAKING  
)

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**COMMENTS OF  
THE COLORADO PUBLIC UTILITIES COMMISSION**

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## **I. INTRODUCTION**

1. The Colorado Public Utilities Commission ("Colorado PUC") respectfully submits these comments on the Further Notice of Proposed Rulemaking ("Further Notice") before the Federal Communications Commission ("FCC") regarding the implementation of Billed Party Preference ("BPP") for 0+ interLATA calls. The Colorado PUC is of the opinion that BPP is an idea whose "time has come - - and gone."<sup>1</sup> The cost of implementation and maintenance of BPP will far exceed the benefits. Alternatives exist that provide benefits similar to or greater than those expected under BPP at far less cost. BPP is not consistent with a realistic view of interexchange or local exchange competition. The Colorado PUC suggests in these comments that the FCC should consider a plan for establishing rate caps that are tied to the rates of the major interexchange carriers. A discussion will follow that provides details of the proposed Colorado alternative plan, including expected benefits and costs.

2. The Colorado PUC also expresses its concern that the FCC proposed plan would impose BPP on providers of operator services that are not FCC-regulated, but which are within the sole jurisdiction of the states, *i.e.*, intrastate interLATA services. In these comments, we will also provide comments and information on several other miscellaneous issues contained in the Further Notice.

## **II. COLORADO PUC PROPOSAL**

3. Prior to the FCC proposal on BPP, the Colorado PUC has approached the emerging competitive operator services industry in much the same manner as the FCC. After the Bell System divestiture, the Colorado legislature enacted a telecommunications statute<sup>2</sup> that defined a tripartite regulatory scheme: fully regulated services (*e.g.*, local exchange services), emerging

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<sup>1</sup> See, Further Notice, Separate Statement of Commissioner James H. Quello.

<sup>2</sup> Telecommunications Act of 1987, H.B. 1336, enacted July 1, 1987. This act replaced Article 15 of Title 40 of the Colorado Revised Statutes (1993).

competitive services (*e.g.*, toll, switched access and private line services), and deregulated services (*e.g.*, cellular, mobile, special access services). Subsequent to the enactment of this statute, the Colorado PUC made a determination that operator services should be virtually deregulated.<sup>3</sup> A few years later, as the alternative operator services industry was developing, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 ("TOCSIA"). The FCC subsequently implemented this act in its rules. The Colorado PUC also recognized a need to assert regulatory jurisdiction over Operator Service Providers ("OSPs") and followed the FCC lead by adopting state rules for OSPs that contained essentially the same requirements as the federal rules. Following the promulgation of the Colorado operator services rule, all OSPs were required to obtain a Certificate of Public Convenience and Necessity ("CPCN") and file tariffs in Colorado. In many instances, the Colorado PUC allowed OSP tariffs to go into effect without hearing. The Colorado PUC assumed that the "TOCSIA-like" consumer protections relating to branding requirements, the free availability of rate information, and all other requirements were sufficient protection against consumer harm.

4. Approximately a year and a half after this rule went into effect, the Colorado PUC was made aware by its staff that the number of Colorado PUC consumer complaints against the OSPs had doubled.<sup>4</sup> OSPs were charging abusively high rates<sup>5</sup> and the Colorado PUC decided

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<sup>3</sup> The statutory language allowed the Colorado PUC to make a determination that operator services could be classified as deregulated. At the time, the sole providers of operator services were AT&T, MCI, and U S WEST. Competition without extensive regulatory intervention seemed to provide the best control in the market as it existed at that time.

<sup>4</sup> The Colorado PUC staff received 93 complaints regarding OSPs during fiscal year 1991-92. We received 191 complaints during fiscal year 1992-93.

<sup>5</sup> Tariffed usage rates for some of the OSP operating in Colorado were as high as 66¢ per minute. Operator surcharges were as high as two to three times those of AT&T, MCI, SPRINT, or U S WEST. Additionally, the OSPs were passing through premise imposed fees ("PIF" or premise surcharges) on behalf of the aggregators as a part of the total call charges. These PIFs amounted to as much as \$2.00 per call. As a specific example in Colorado, a consumer complained to the Colorado PUC regarding charges on one minute credit card local calls of more than \$5.00. Another consumer filed a complaint regarding charges of almost \$8.00 for a one minute intraLATA credit card call.

it needed to take further steps to regulate this industry. Apparently, the thinking of the Colorado PUC and the FCC diverge at this point. The Colorado PUC commissioners and staff worked in tandem with the OSP and Independent Public Payphone ("IPP") industries in order to develop a more thorough understanding of the industry. The Colorado PUC then proposed revisions to its operator services rules in a few major ways to remedy this problem. First, it developed a scheme of relaxed regulation<sup>6</sup> for all OSPs who priced services at or below the established rate maximums for regulated interexchange carriers (*e.g.*, AT&T, U S WEST, MCI, and SPRINT).<sup>7</sup> Second, it provided a standard tariff approach<sup>8</sup> for those OPSs who desired to support rates higher than the benchmark rates. Finally, it prohibited the OSPs from including within its OSP rates premise imposed fees on behalf of aggregators. This rule was to become effective April 30, 1994. However, the Colorado Payphone Association ("CPA") and a consortium of OSPs were granted a stay of the new rules from the district court until such time as their objections

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<sup>6</sup> This relaxed regulation includes waivers of various PUC rules and regulations normally applied to Local Exchange Companies ("LECs"), *i.e.*, Uniform System of Accounts ("USOA") requirements, cost allocation rules, tariffing and pricing flexibility, and customer notice requirements.

<sup>7</sup> In Colorado, the intrastate toll rates for interLATA facility-based carriers (AT&T, MCI, SPRINT) are flexibly regulated. AT&T was granted pricing flexibility wherein the company was allowed to price its services between its current rates (in 1987) and a cost floor equal to long run incremental cost. Therefore, AT&T currently has a maximum rate filed with the Colorado PUC equal to its rates in 1987. Its current prices are significantly less than that price (approximately 30%). The Colorado OSP rules concerning rates tied the rates of the other OSPs to the maximum allowed rates of the interexchange carriers (including AT&T, MCI, SPRINT, and U S WEST). Although the order did not tie the rate benchmark to any particular carrier, the maximum allowed rates were established at the levels that existed in 1987, when AT&T rates peaked. Therefore, the rate benchmark is sometimes referred to as being capped at AT&T rates. In reality, the other OSP rates are to be compared to the maximum rates, not the current rates.

<sup>8</sup> A standard tariff approach is one where the provider supports its proposed rates with any and all appropriate information. This includes specific costs studies, forecasted revenues and expenses, marketing information, technical service descriptions, and any other data that will allow the PUC to determine whether proposed rates meet the statutory requirement of being just and reasonable.

to those rules could be heard before the court.<sup>9</sup>

5. Through numerous rulemaking and complaint proceedings, the Colorado PUC has determined that its currently-stayed OSP rule is the most cost-effective method of providing the types and magnitude of benefits sought by the FCC but at a minimum of costs relative to BPP. It provides the consumer safeguards similar to the FCC TOCSIA rules. Additionally, it allows full and free competition for all OSPs whose prices are within a PUC-determined range of reasonableness. Finally, the cost of administration of such a system is relatively inconsequential in comparison to the costs of BPP. We believe that the complex, investment and expense intensive BPP approach should be rejected in favor of a simpler, less expensive rate cap approach.

#### **A. BENEFITS OF THE COLORADO PROPOSAL**

6. The Colorado proposal provides for a reasonable rate standard within which full and free competition will occur, but which also protects consumers until such time as the market mechanisms become fully operational. All OSPs operating under this standard will compete with each other on the basis of price, range and quality of service, dependability, vertical integration, and all of the other beneficial results of a truly competitive marketplace. It removes the ability of an OSP to charge excessively high rates that have allowed OSP competitors to promise and pay inordinate commissions to aggregators which results in gross incongruities between costs and benefits for end-users. The benefits that have emerged in the OSP industry, such as foreign language translation, innovative directory assistance services, and fraud control<sup>10</sup> will be

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<sup>9</sup> *Colorado Payphone Association v. Public Utilities Commission of the State of Colorado*, Case No. 94 CV 0977, and *Midamerica Communications Corporation d/b/a LDDS Communications, Teltrust Communications Services, Inc., International Pacific, Inc., and National Technical Associates, Inc. v. Public Utilities Commission of the State of Colorado*, Case No. 94 CV 1322.

<sup>10</sup> Several people from the Colorado PUC, including one commissioner and two staff members, visited the operation of an OSP in Salt Lake City. That OSP demonstrated its foreign

allowed to develop with providers operating within the rate standard. For those OSPs operating at or below the rate standard, only the most efficient will remain in business, thereby keeping the market competitive.

7. With a reasonable, known rate standard, consumers would save the effort of using alternative dialing codes. Those early adapters who have already learned the system of dialing around the aggregator's presubscribed carrier could still do so under the existing FCC rules. Those consumers who do not have a desire or the ability to learn complex dialing codes or to register formal complaints would not be harmed because rates charged would be within an acceptable range.

8. Since most, if not all OSP providers, would likely operate within such a rate standard, competition within that group would develop into a purer, non-perverse form of competition requiring less regulatory oversight. If the FCC were to allow maximum regulatory flexibility to those providers operating within the FCC's rate and service rules, society would gain the maximum amount of benefits of competition at a minimum of regulatory and other societal costs. The regulatory costs of the Colorado proposal would be minimal assuming the creation of a price standard for the entire industry and the allowance of maximum regulatory flexibility for OSPs.

9. For those OSP providers that provide specialized operator services,<sup>11</sup> rules should be written to allow such specialized providers to charge cost-based rates above the maximum rate standard.

10. The Colorado proposal has another advantage in that it does not interfere with the

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language translation capabilities and its ability to provide enhanced directory assistance services. It also provided us with detailed information on their fraud control efforts, including cooperation with major interexchange carriers.

<sup>11</sup> An example of a specialized operator service provider might be inmate service providers. These providers might be able to demonstrate a different and/or higher rate for services they provide.

development of the telecommunications infrastructure. Any future local exchange competition, integrated wireline, digital radio, direct broadcast satellite and/or broadband infrastructure will not be impeded by complex network interfaces such those imposed by BPP.

11. A less obvious benefit of the Colorado proposal lies in the distinction between consumers using operator services. First, there are those knowledgeable, technology-smart consumers who have learned how to access their preferred carrier, and those transient customers who have not learned and do not desire to learn how to avoid the apparent overcharging. The first group of consumers will have the same benefits they enjoy today. They have learned how to dial around the presubscribed OSP of the public phone to obtain service from their own carrier and would continue to have that capability. It is the second body of consumers about whom the Colorado PUC and the FCC are really concerned. These consumers are the ones being caught unawares and being charged excessive rates. Under the Colorado proposal, these consumers would be able to comfortably use any public phone with the assurance that the rates being charged will be reasonable.

12. OSP protestations notwithstanding, the industry will benefit from the implementation of the Colorado proposal. Since many of the existing OSPs are charging rates that would likely fall within the rate standard without any rate reductions and most others would lower their rates to that level in order to remain in business, they would be free to compete in the provision of better service at lower prices.<sup>12</sup> This rate equality requirement would stem the tide in dial around traffic and give the OSPs the ability to reverse that trend through better service. Since none of the OSPs would be allowed to offer today's high commissions, the OSP market could focus on the consumer, rather than commissions paid to the public phone providers.

## **B. COSTS OF THE COLORADO PROPOSAL**

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<sup>12</sup> The industry, consumers, and society at large is better off without the price-gougers, who may be forced out of business by the Colorado proposal. In fact, a properly functioning competitive market would eliminate in short order the unscrupulous or inefficient providers. Continued or prolonged existence of such providers is not in the best interest of our society.

13. The costs related to the Colorado proposal are dependent upon the amount of regulatory oversight the FCC desires or requires. Our recommendation is one that couples a reinforcement of the existing TOCSIA rules with a FCC-determined price standard for all OSPs. Use of the existing enforcement process of the TOCSIA rules would not increase the costs to the FCC. However, the FCC would have to develop a rate standard that it would apply to all providers, probably through a further rulemaking process. After this process is complete, our recommendation would be for each provider to file and maintain its current price list with the FCC for reference purposes. In the event a specialized OSP desires to provide service at a higher rate, the FCC could use standard cost justification requirements. The cost of this proposal would be little more additional cost than that associated with the administrative oversight of the price lists. The incremental cost of this proposal is insignificant relative to its benefits.

### **C. WEIGHING OF BENEFITS AND COSTS OF THE COLORADO PROPOSAL**

14. As described, the benefits derived from the Colorado proposal produce tangible benefits similar to those calculated in the Further Notice<sup>13</sup> in addition to the intangible benefits of more competition<sup>14</sup> and additional and better quality services. The incremental costs associated with the Colorado proposal are very close to zero. Based upon this anecdotal evidence, the cost benefit ratio significantly exceeds that of the FCC's BPP proposal.

### **III. COMMENTS ON BPP PROPOSAL**

15. In ¶ 2 of the Further Notice, the FCC states its belief that BPP will stimulate competition by "... eliminating AT&T's advantages in the operator services market and by

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<sup>13</sup> See discussion *infra*.

<sup>14</sup> Greater competition in this context includes more competitors, not just greater competition between AT&T and its rival interexchange carriers.

refocusing operator services competition." Although we agree that BPP would provide additional competitive benefits, it is our opinion that BPP will have the undesirable and unintended effect of eliminating most, if not all of the third-tier OSPs. Specifically, the BPP conversion will have customers choosing operator service providers with relatively no chance of choosing a third tier OSP. Most will choose an OSP associated with their currently selected 1+ carrier. We agree that BPP will give AT&T less of an advantage than the current system; however, this is because most customers will choose the same provider for both 1+ and 0+ services. What this accomplishes is an immediate shift of all OSP traffic to the major 1+ carriers that offer operator services in the same proportion as the 1+ selections. We do not think this is a result that promotes competition. Competition is best promoted by devising a plan that allows at least some probability for third-tier OSPs to have an equal opportunity to attract and maintain customers.

16. The Further Notice also states that ". . .heightened, more consumer-oriented competition should result in lower prices and better services, which, coupled with easier access, should stimulate network usage." (emphasis added) This statement has little empirical support. OSP market competition among the largest carriers is already producing some of these results without BPP.<sup>15</sup> The conclusion that network usage will be stimulated is unsupported. Network usage is growing at a faster pace than the overall economy. BPP, in and of itself, will not necessarily provide additional stimulation.

17. The Further Notice goes on to state in ¶ 2 that the "technology required for BPP would enrich the nation's telecommunications infrastructure." It might enrich the infrastructure for the LECs; however, it will place another obstacle in the path of local exchange competition. Requiring all calls to be routed through the LEC and its 0+ software, hardware, and database before sending them to the appropriate OSP augments the "local bottleneck," and adds a level of processing that is totally unnecessary and extremely expensive.

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<sup>15</sup> Evidence of competitive services are the 1-800-COLLECT, 1-800-CALLATT, 1-800-OPERATOR services offered by AT&T and MCI.

18. On page 3 of the Further Notice in footnote number 5, the FCC states that it has found that ". . . over ninety percent of telephones complied with [the FCC's] own consumer protection requirements." We are aware of states performing compliance audits on the payphone industry and arriving at far less glowing results.<sup>16</sup> Our own small sampling of Colorado IPPs showed only 2/3 of these phones allowed for 10XXX access.

19. Footnote number 5 also states that BPP ". . . would most likely eliminate the commissions that increase the cost structure." There are also numerous other locations in the Further Notice that address commission payments. We believe that the FCC has mistakenly failed to note that there are actually two distinct commission structures in the public phone and OSP industry. The commissions most likely referred to in the Further Notice are the commissions paid to the owner of the public phones (IPP) by the OSPs. These are normally paid by providing a percentage of gross revenues or, in some cases, the net of total revenues less OSP fees. We agree that these OSP to IPP commissions would likely be eliminated under BPP as they have been under the Colorado proposal. However, there is another set of commissions paid by the IPP to the site owner. For example, the payphone operator may pay an inordinately high commission to the convenience store owner in order to secure the right to place the payphone on the site. These commissions are currently being paid by all payphone providers, including the LEC and AT&T payphones. BPP will not eliminate the site commissions.

20. With regard to the FCC's calculation of the expected savings from BPP, we believe that these calculations might be misleading since movement from higher priced OSPs to main stream OSPs appears to be occurring with or without BPP or any other plan. This movement and the resulting savings might occur more quickly under some other plan; but they will occur eventually. Extrapolation of the recent historical growth of "dial around minutes" might reinforce this conclusion. The FCC's calculations appear to rely upon unsupported assumptions. In each of the two major calculations, the FCC has merely assumed that a fraction, like 1/3, of

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<sup>16</sup> Although we do not have the specifics, Texas has performed numerous compliance audits and has produced results far less than the 90% figure presented herein.

the customers will migrate to lower priced OSPs. No basis for the fundamental elements of this calculation is given; therefore, they are highly speculative and better estimates are derived from calculations which assume that all third-tier OSP rates converge quickly to the combined interexchange carrier rate. This would provide a savings estimate of \$291 million.<sup>17</sup> Even if we were to assume that the FCC has jurisdiction over intrastate interLATA calling, the figure would be only \$422 million if all third tier OSP revenue is converted to the lower rates. It is our conclusion that the FCC's calculations yielding the \$280 million customer migration amount and the \$340 million in commission savings result from double counting the same savings amounts. The Colorado PUC would estimate the consumer savings for its proposal, using the FCC's numbers, to be \$291 million.

21. The FCC recognizes in ¶ 13 that the consumer may not realize all of these savings because some aggregators may seek to recover lost commission payments through direct surcharges on end users for telephone usage. In Denver District Court wherein the Colorado Payphone Association ("CPA") is challenging the PUC's rules, witnesses for the CPA repeatedly stated on the record that they could not survive without these surcharges. Additionally, U S WEST has filed a tariff in Colorado that would institute "set use" fees from all of its public phones.<sup>18</sup> It is our opinion that the owners of public phones have a right to require payment for the use of their equipment; however, surcharges hidden in the operator rates are inappropriate, anti-competitive, and abuse even sophisticated users. Set use fees or other alternatives should be sought without allowing these inordinately large commission payments and

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<sup>17</sup> If we use the same numbers supplied in the Further Notice, the third tier OSPs recorded \$1.2 billion in revenue in 1991. If you then assume the same ratio of third tier OSP rates to AT&T, MCI, and SPRINT that produces the 36% rate differential, the amount of revenue from third tier OSPs above the other OSPs is \$430 million. Assume the same growth rate of 4.3% per year to arrive at \$554 million of overcharging for 1997. Break that number up into its intrastate and interstate components (differing from the Commission's calculation wherein they assumed intrastate interLATA was under their jurisdiction) to arrive at \$291 million in interstate savings by converting all third tier OSP interstate revenue to the lower rates.

<sup>18</sup> The proposed "set use fee" is for a 35¢ charge to be deposited into the pay station prior to completing any intraLATA USWC long distance call, including 0+ calls.

Premise Imposed Fees from the OSPs to the IPPs.

22. The cost estimates provided by the LECs to implement BPP obviously have very wide confidence intervals. Even if one assumes that the estimates are the best the LECs can produce, based upon our experience with such preliminary cost estimates, the final costs would probably be two to three times greater than these numbers.

23. Also relating to the cost estimates, footnote 44 in the Further Notice states that the LECs have indicated that their cost estimates should add an overhead factor in the neighborhood of 25%. It has been the experience in Colorado, dealing with U S WEST, that the usual amount of true overhead is closer to 10%-12%, not 25%. In any event, should the FCC elect to pursue BPP, the cost issue needs further research. However, the Colorado PUC maintains that order of magnitude changes are necessary for BPP to approach economic feasibility.

#### **IV. JURISDICTION ISSUES**

24. The Colorado PUC believes that the FCC does not have jurisdiction over all interLATA services, as implied throughout the BPP Further Notice. The FCC has jurisdiction over all interstate services. State utility commissions properly exert jurisdiction over all intrastate services. Therefore, it is imperative that the FCC realize that its discussion erroneously implies jurisdiction over intrastate interLATA services.

#### **V. OTHER ISSUES**

25. The Colorado PUC agrees with those parties who have opined that BPP will cause a deterioration of service. Multiple access of different operators (first the LEC operator, then the operator of choice) is likely to cause service problems, consumer discontent, longer holding times for operator calls, and unnecessarily higher costs. Competition should lower costs and prices. If it is necessary to build an overly elaborate platform for competition, such as BPP, more extensive research is advised. The Colorado PUC proposal allows the possibility of

healthy, beneficial competition without all the unnecessary, and potentially harmful results of BPP. While we do not have empirical data to support this contention, we believe it is intuitively obvious.

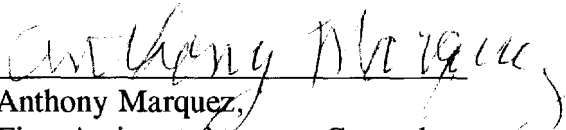
26. The investigation into the appropriate level and method for payphone compensation on "dial around calls" is an issue that needs to be accelerated. "Per call" compensation, as proposed by AT&T, should be an immediate consideration for all regulators, federal and state. A compensatory amount should be reimbursed to the payphone owner for the use of his or her equipment on dial around calls.

27. The FCC notes a statement made in comments filed by U S WEST in the original Notice in footnote 57 wherein U S WEST claims that the number of payphones has not increased significantly with the higher commission payments. We disagree. The number of U S WEST public access lines (sold to IPPs) has grown steadily from zero by an average of 32 % per year. We would not call that insignificant growth.

28. No cost estimates were included in the Further Notice for the balloting process. Although probably not a significant amount, it is a relevant cost of BPP.

Dated at Denver, Colorado this 19th day of July, 1994.

Respectfully submitted,

  
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